

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	4
Reasons for granting the writ	7
Conclusion	17

CITATIONS

Cases:

<i>Bates & Guild Co. v. Payne</i> , 194 U. S. 106	14
<i>Board of Education v. Barnette</i> , 319 U. S. 624	11
<i>Leach v. Carile</i> , 258 U. S. 138	14
<i>Lewis Publishing Co. v. Morgan</i> , 229 U. S. 288	13
<i>Market Co. v. Hoffman</i> , 101 U. S. 112	13
<i>Milwaukee Publishing Co. v. Burleson</i> , 255 U. S. 407	14
<i>Postmaster General v. Early</i> , 12 Wheat. 136	13
<i>Smith v. Hitchcock</i> , 226 U. S. 53	14

Statutes:

Revised Statutes § 396 (5 U. S. C. § 369)	2, 9
Postal Classification Act of 1879, 20 Stat. 358, as amended:	
Sec. 7 (39 U. S. C. 221)	3
Sec. 10 (39 U. S. C. 224)	3
Sec. 14 (39 U. S. C. 226)	3, 5, 8, 9, 11
Act of March 3, 1901, 31 Stat. 1107 (39 U. S. C. § 232):	
Sec. 1	4, 9

Miscellaneous:

Annual Report of Postmaster General, 1941, p. 89	12
Annual Report of Postmaster General, 1942, p. 23	12
8 Cong. Rec. 2135	12

(1)

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 399

**FRANK C. WALKER, AS POSTMASTER GENERAL OF
THE UNITED STATES, PETITIONER**

v.

ESQUIRE, INC.

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA**

The Acting Solicitor General, on behalf of the Postmaster General of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above-entitled case on June 4, 1945.

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 1963-1975) is reported at 55 F. Supp. 1015. The opinion of the Court of Appeals (R. 1987-1994) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 4, 1945 (R. 1995). The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Fourth Condition of Section 14 of the Postal Classification Act of 1879 casts upon the Postmaster General the duty to determine whether a publication, offered for mailing in the second class, is "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry" and if so, the scope of the power conferred.

2. Whether Congress has constitutional authority to vest such a duty in the Postmaster General.

STATUTES INVOLVED

Section 396 of the Revised Statutes (5 U. S. C. 369) provides, in part:

It shall be the duty of the Postmaster General: * * *

Second. To instruct all persons in the Postal Service with reference to their duties. . . * * *

Ninth. To superintend generally the business of the department and execute all laws relative to the Postal Service.

The Classification Act of 1879, 20 Stat. 358, as amended, provides as follows:

Section 7 (39 U. S. C. 221) —

Mailable matter shall be divided into four classes:

First, written matter;

Second, periodical publications;

Third, miscellaneous printed matter and other mailable matter not in the first, second, or fourth classes;

Fourth, merchandise and other mailable matter weighing not less than eight ounces and not in any other class.

Section 10 (39 U. S. C. 224) —

Mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year and are within the conditions named in sections twelve and fourteen.

Section 14 (39 U. S. C. 226) —

Except as otherwise provided by law, the conditions upon which a publication shall be admitted to the second class are as follows: First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively. Second. It must be issued from a known office of publication. Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding such as distinguish printed books for preservation

from periodical publications: *Provided*, That publications produced by the stencil, mimeograph, or hectograph process or in imitation of typewriting shall not be regarded as printed within the meaning of this clause. Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers. Nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.

Section 1 of the Act of March 3, 1901, 31 Stat. 1107 (39 U. S. C. 232) provides in part:

When any publication has been accorded second-class mail privileges, the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested.

* * * * *

STATEMENT

The respondent is engaged in the publication, distribution, and sale of the monthly periodical, Esquire Magazine (R. 1868, 1976), which was entered at the United States Post Office as second-class mail matter on December 15, 1933 (R. 1868, 1976). The petitioner, the Postmaster General of the United States, caused a citation (R. 1-4)

7

and an amended citation (R. 5-10) to be issued on September 11 and October 4, 1943, respectively, requiring respondent to show cause why the second-class mailing privileges for Esquire should not be suspended, annulled, or revoked, upon the ground, *inter alia*, that because of the inclusion of obscene material "and other matter of a similar or related nature" in the issues for January through November 1943, Esquire "has not fulfilled the qualifications of second-class mailing privileges established by the Fourth Condition" of Section 14 of the Classification Act of 1879 (20 Stat. 359, 39 U. S. C. 226) (R. 1-2, 5-6). Pursuant to notice, a hearing was held from October 19 to November 6, 1943 (R. 20-1835), before a three-man hearing board designated by the Postmaster General (R. 19).

At the hearing, on October 25, 1943, counsel for the Postmaster General stated that it was the Post Office Department's position that Esquire did not meet the tests of the Fourth Condition of Section 14 of the Classification Act of 1879 because it was not "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry" (R. 604-605, 1011-1012). Extensive evidence was adduced by both parties (R. 45-1763).

On November 11 and 12, 1943, the members of the hearing board submitted their reports and recommendations to the Postmaster General (R.

1836-1855), together with a transcript of the proceedings before them, which included the testimony and exhibits and the briefs and arguments of counsel (R. 1857). Two members of the board recommended dismissal of the proceeding (R. 1839); the third, the withdrawal of second-class mailing privileges from respondent (R. 1851-1855). On December 30, 1943, the Postmaster General entered his order (R. 1856-1865), finding that Esquire does not comply with the Fourth Condition (R. 1864); and revoking Esquire's second-class mailing privileges, effective February 28, 1944 (R. 1865).

On February 15, 1944, respondent filed its amended complaint in the District Court of the United States for the District of Columbia (R. 1867-1885), seeking an injunction to restrain the enforcement of the Postmaster General's order (R. 1873-1875). The Postmaster General filed an answer (R. 1887-1891) incorporating the proceedings before the Post Office Department (R. 1890-1891). At a pretrial conference (R. 1891-1893), the parties stipulated, *inter alia*, that the suit would not be defended on the ground that Esquire "is obscene within the meaning of 18 U. S. C. 334, or that it is non-mailable within the provisions of that or any other statute" (R. 1892).

¹ The parties also stipulated that petitioner would not defend "on the ground that plaintiff would not sustain irreparable damage if the order in question was wrongful and invalid" (R. 1892).

After a hearing (R. 1893-1963), the District Court issued its findings of fact (R. 1976-1978), conclusions of law (R. 1978-1979), and opinion (R. 1963-1975), and on July 27, 1944, entered judgment for the Postmaster General, denying an injunction and dismissing respondent's complaint (R. 1979). The District Court found and concluded that "The Postmaster General's determination that Esquire was not originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, was not clearly wrong, nor unlawfully made, nor arbitrary, capricious or unsupported by substantial evidence" (R. 1978); and that the order assailed did not exclude Esquire from the mails, did not impose censorship or involve any infringement of the rights of free speech and free press, and was lawful and valid (R. 1978).

The court below reversed the judgment of the District Court (R. 1995).

REASONS FOR GRANTING THE WRIT

An authoritative decision by this Court of the questions presented by this case is of the highest importance from the standpoint of postal administration. These questions are (1) whether or not the Postmaster General has had confided to him by Congress in Section 14 of the Postal Classification Act a duty to determine whether a given periodical publication meets the prescribed condition

that it be "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry", so as to be eligible for second class mailing privileges, and, (2) whether Congress may constitutionally confer such a duty upon him. A second class entry confers the benefit of a materially lower postage charge than would apply if it were withheld, involving service at less than cost to the Government.

Strongly indicated in the opinion and implicit in the decision below that the Postmaster General exceeded his power is the conclusion that he is not vested with the duty in question but must admit to second class privileges any periodical publication which complies with certain formal requirements of the Act. This conclusion is, we believe, erroneous and contrary to that required by the statutory language. The opinion, however, does not consider the statute in the light of its history and purpose and contains no clear guidance as to its proper interpretation. It leaves the Post Office Department at sea as to the administration of a provision which purports to vest in the Postmaster General an important power with regard to the classification of mail matter. In addition, the opinion casts grave doubt upon the constitutionality of possible future legislation for dealing with the problem, unless any attempt to classify periodicals accord-

ing to the character of their content should be omitted from it.

Section 14 of the Postal Classification Act (*supra*, pp. 3-4) prescribes four conditions upon which a periodical publication shall be admitted to the second class of mailable matter. The first three conditions relate to the physical makeup of the periodical and the manner of its publication. The Fourth Condition relates to origin and purpose, and contains the requirement that the publication be "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry—* * *". On its face this language requires a determination of whether the publication complies with the condition—a determination which rests with the Postmaster General under his statutory duty "to instruct all persons in the Postal Service with reference to their duties" and "to * * * execute all laws relative to the Postal Service." (R. S. §396, 5 U. S. C. 369, *supra*, p. 2.) Such a determination involves the making of a judgment as to the character of the publication's content as does the Postmaster General's statutory duty to determine whether or not to suspend or annul second class privileges after a hearing (39 U. S. C. 232, *supra*, p. 4). In this case the Postmaster General, after elaborate hearings and careful consideration, determined that Esquire

Magazine derives its essential character from the consistent inclusion of morally improper and harmful articles, cartoons, drawings, and photographs, which negative the purpose required by the statute as a condition of admission to the second class (R. 1863).

The opinion of the court below recognizes at one point that "no doubt * * * a duty exists" for a publication "to contribute to the public good and the public welfare" as a condition of enjoying second class privileges (R. 1988), but it denies the existence of "the power claimed by the Post Office" to indulge in the "kind of censorship exercised in this case" (R. 1993, 1994). The opinion does not state whether no power at all exists to exclude periodicals from the second class because of their content, although this is indicated by admonitions to cease attention to "literary or moral standards" and to confine activity to getting the mails through (R. 1990, 1994). Constitutional cases involving freedom of speech and of the press are cited for their "broad principles" (R. 1988: n. 2) although, unlike the case at bar, they involve the use of penal sanctions or the contempt power; for evidently the economic effect of loss of second class privileges is deemed to be as serious as criminal punishment (R. 1987-1990). In this connection, however, compare the cited

case of *Board of Education v. Barnette*, 319 U. S. 624, at p. 632.

As a consequence of the state in which the matter has been left, the Post Office Department is confronted on the one hand by a Congressional mandate to admit to the second class only those publications which, *infer alia*, meet the requirements of the Fourth Condition, and on the other hand with a decision which seems to deny all power to exclude periodical publications for failure to comply with the Fourth Condition. Both administrative and legislative power to cope with the problem are jeopardized. Clarification is imperative.

In its denial of the authority here exercised and to the extent that it adopted a negative view of the authority of the Post Office Department in administering the Fourth Condition, the court below erred, as we believe, and its action requires correction at the hands of this Court. The language of the Fourth Condition on its face calls for the use of authority such as the Postmaster General exercised here. The opinion states no reason why this language should not be given its natural meaning except that the exercise of such authority would involve an objectionable, and possibly unconstitutional "censorship", enabling "an administrative official" to determine "what is good for the public to read" according to his own

"notions of the public good" (R. 1988, 1989). It is obvious, however, that the classification of postal matter on other than a purely mechanical basis necessarily involves the exercise of some discretion. The court below does not suggest that a better device could be adopted than the judgment of a responsible executive official, aided by a departmental administrative staff.

There is no question that in maintaining the second class of mail Congress is giving effect to a purpose of subsidizing periodical publications which meet the requirements of Section 14, in the belief that facilitating the circulation of such periodicals furthers the public welfare. At the present time the extent of the subsidy to publishers through the enjoyment of second class privileges is approximately \$80,000,000 a year. The administration of this subsidy requires consideration each year of approximately 2,000 applications for admission of publications to the second class.

The legislative history of the Postal Classification Act of 1879 contains explicit expression of the purpose which Congress had in mind. It was said in debate that "papers are allowed to go at a low rate of postage: * * * because they are the most efficient educators of our people. It is because they go into general circulation and are intended for the dissemination of useful knowledge such as will promote the prosperity and the best interests of the people all over the country." 8 Cong. Rec. 2135.

Annual Report of the Postmaster General, 1941, p. 89. In the year covered, first class mail revenues exceeded apportioned expenditures by \$146,815,578; the exact second class deficit, on the other hand, was \$83,519,746.

⁴ *Idem*, p. 32; Annual Report, 1942, p. 23.

There is no reason to suppose it was intended that in distributing such largess out of the treasury all comers in the periodical field should share, regardless of how far removed their publications might be from the purposes stated in the statute.

We submit that the view expressed by the court below is wrong and requires correction. It violates the long settled principle that language in a statute is, where possible, to be given meaning rather than held meaningless. *Postmaster General v. Early*, 42 Wheat. 136; *Market Co. v. Hoffman*, 101 U. S. 112. No censorship is involved, such as was advanced to justify the disregard of the clear meaning of the statute. The mails remain open to *Esquire Magazine*, but at rates less costly to the public, which are applicable to other classes of mail. The only power that has been exercised is the well-established one of classifying the mails. As this Court has stated, Congress "has the comprehensive right to classify" the mails and may "in the interest of the dissemination of current intelligence", legislate so as to favor one class of matter over another. *Lewis Publishing Co. v. Morgan*, 229 U. S. 288, 313. Nor is the power to resort to administrative action inapplicable to this field. It is, on the contrary, particularly appropriate here; and the degree of finality which has been accorded to administrative decisions of the Postmaster General has been greater than in many other areas of

administration. *Leach v. Carlile*, 258 U. S. 138; *Milwaukee Publishing Co. v. Burleson*, 255 U. S. 407; *Smith v. Hitchcock*, 226 U. S. 53; *Bates & Guild Co. v. Payne*, 194 U. S. 106. Financial benefit to a publisher does not furnish a persuasive reason for departure from these views.

We think it is clear that the exercise by Congress of its power of classifying the mails and the use of discretionary administrative authority in applying the classification to publications offered for mailing do not infringe any constitutional guaranty. This Court so held in *Milwaukee Publishing Co. v. Burleson*, 255 U. S. 407, 410, with respect to the second class privilege, which is recognized as "a frank extension of special favors to publishers because of the special contribution to the public welfare which Congress believes is derived from the newspaper and other periodical press." The validity of classifying mailable matter and the power to revoke a second class permit for failure to comply with the requirements of the statute were not denied in the dissenting opinions of Mr. Justice Holmes and Mr. Justice Brandeis in that case. Their dissents were based, rather, upon the ground that the presence of non-mailable matter in past issues does not by itself justify revoking a second class permit as to future issues of a publication which on the whole meets the statutory requirements. They contended, as we concede, that the wrongful denial of second class

privileges to a particular publication may constitute an infringement of constitutional guaranties; but it does not follow that the power to withhold such privileges for statutory reasons is non-existent.

The effects of the denial of authority in this case cannot be confined to the specific instance, since the Postmaster General's order is not set aside because of error in the conclusion or in the proceedings which led to it. On the contrary, the opinion concedes that "the Government is clearly right in its contention" that a court may not review the Postmaster General's conclusion in a particular case if supported by substantial evidence, "once the power claimed by the Post Office is assumed to exist", and that the testimony supporting the order cannot be brushed aside as insubstantial (R. 1993).

Even as to the particular case, however, the elaborateness of the administrative proceedings, the substantial basis in the record for the Postmaster General's order, and the interests which turn upon the outcome, call for careful consideration of the issues involved and might, even without more, justify review by this Court. The amended citation which formed the basis of the proceeding for withdrawal of Esquire Magazine's second-class privileges cited 32 instances of specific material in 11 issues which was deemed to

be objectionable (R. 8-10)⁵ and which was alleged to be representative of other matter contained in the publication (R. 6).⁶ The order of the Postmaster General cites testimony of the editor of Esquire to the effect that the magazine stressed a "stag-party type of treatment" and "the smoking room type of humor" (R. 1863). A substantial body of testimony supported the view that the content of Esquire Magazine is basically objectionable.⁷ Whether power exists to exclude such a publication from the enjoyment of a public subsidy is in itself a question of importance.

The administrative decision involves no suppression of Esquire Magazine, but simply withholds from its dissemination the assistance which

⁵ The original and amended citations (R. 1-10) charged that this material was obscene and nonmailable and that by reason of its inclusion and the inclusion of similar material the publication failed to satisfy the Fourth Condition for admission to the second class. During the hearing it was agreed that the basis alleged for revoking second-class privileges would be the publication of objectionable material, whether or not it was technically obscene and nonmailable (R. 26-28, 43-45, 601-606, 1011-1019). The order of the Postmaster General stated that no question of nonmailability because of obscenity was involved (R. 1857). At the pre-trial conference in the District Court it was stipulated that the Postmaster General would not defend upon the ground that Esquire Magazine was obscene or nonmailable (see *supra*, pp. 6-7).

⁶ The testimony supporting the order is at R. 978-986, 1160, 1163-1165, 1187, 1216-1217, 1282, 1284-1285, 1293-1296, 1395-1397, 1420-1551, *passim*, 1567-1569, 1575, 1593-1595, 1601, 1635, 1656-1659, 1715-1724.

Congress has sought to limit to publications falling within a particular statutory description to which Esquire is thought not to answer. Not only is that decision soundly based, but the power to reach it was, we contend, validly conferred. It follows that the judgment of the Court of Appeals should be reversed.

CONCLUSION

We respectfully submit that for the foregoing reasons this petition should be granted.

HAROLD JUDSON,
Acting Solicitor General.

SEPTEMBER, 1945